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Abdul Mudtalib bin Ismail v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–231–05 OF 2019
KAMALUDIN MD SAID, AZIZAH NAWAWI AND AHMAD NASFY JJCA
10 SEPTEMBER 2020

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Criminal Procedure — Appeal — Appeal against order of forfeiture — High Court allowed prosecution's application for order of forfeiture of specific assets of appellant under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds from Unlawful Activities Act 2001 ('the AMLATFUAA') — Whether learned judge erred in finding that the properties were proceed of predicate offence under s 420 of the Penal Code — Whether learned judge erred in admitting statements by third, fourth and fifth respondents in the High Court under s 32 of the AMLATFUAA — Whether statements taken under s 32 of the AMLATFUAA could only be safely relied upon if there were other independent evidence which tend to corroborate the statements — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds from Unlawful Activities Act 2001 ss 32, 40, 56 & 61 — Penal Code s 420

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This was an appeal by the appellant against the High Court's order which allowed the public prosecutor's application vide a notice dated 26 April 2018, inter alia, for an order of forfeiture of specific assets belonging to each of the respondents in the High Court. The appellant was the second respondent in the High Court. The grounds of appeal relied upon by the appellant were: (a) the learned High Court judge had erred in holding that the prosecution had satisfied the burden of proving that all the properties sought to be forfeited were the proceed of the predicate offence under s 420 of the Penal Code ('the Code') ('the first issue'); and (b) the learned High Court judge had erred in admitting the statements of the third, fourth and fifth respondents in the High Court made under s 32 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds from Unlawful Activities Act 2001 ('the AMLATFUAA') as the sole evidence without considering other evidence in holding that the predicate offence under s 420 of the Code had been committed ('the second issue'). In relation to the second issue, the appellant submitted that: (i) the prosecution's case was premised entirely on the statements given by the third, fourth and fifth respondents in the High Court ('the first submission'); (ii) the learned judge had erred in failing to exercise caution in evaluating the statements, especially so when there was a clear absence of other evidence apart for the statements alone ('the second submission'); and (iii) the statements taken under s 32 of the AMLATFUAA

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could only be safely relied upon if there were other independent evidence which tend to corroborate the statements ('the third submission'). The appellant had also raised a constitutional argument that the proceeding herein impinged upon the appellant's right as protected under art 13 of the Federal Constitution, namely the right to property ('the constitutional argument').

Held, dismissing the appeal:

(1) In cases where a constitutional issue was raised, the point may be taken although not specifically stated in the petition as this approach would give due respect to the Federal Constitution and the very concept of the supremacy of the Constitution. It was on this basis that the court had allowed the parties to canvass before the court the constitutional argument (see paras 17–18).

(2) The learned counsel for the appellant had not sought to argue that the relevant provisions of the law under which the application for forfeiture was made namely the AMLATFUAA were unconstitutional. Instead, a rather inchoate submission was canvassed by the counsel. The court found that this submission was not carefully made or well thought out. This submission was nothing but a dressed-up argument in the garb of constitutional point. The court therefore rejected the constitutional argument (see para 19).

(3) The court agreed with the learned High Court judge that the requirements under s 56(1) read with s 61 of the AMLATFUAA had been met. In paras 72–85 of the written grounds the learned High Court judge had considered the status of the property and came to the conclusion that the properties were acquired from the proceed of unlawful activity. The court had also carefully considered the record of appeal and the court was satisfied that the evidence presented before the High Court showed an overwhelming evidence that the properties were indeed acquired not from lawful means, but from the proceeds of unlawful activity (see paras 28–29).

(4) The first submission and the second submission were without merit because there were evidence before the High Court. In relation to the third submission, there was nothing in the case of *Pendakwa Raya v Awalluddin bin Sham Bokhari* [2017] MLJU 1766 which could be construed as laying down a principle that corroboration was a priority for the statements under s 32 of the AMLATFUAA to be admitted or relied upon. In the said case, the Federal Court in no uncertain term, had stated that by virtue of s 40, the statements recorded under s 32 would be admissible notwithstanding any written law to the contrary. Therefore, there was no merit in the third submission. Further, the court had carefully considered the statements to be statements that could be properly admitted and relied upon by the learned judge in making the

assessment and disposing the application under s 56 of the AMLATFUAA. There was no fault in the manner in which the learned judge had evaluated the evidence before him (see paras 32–36).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap perintah Mahkamah Tinggi yang membenarkan permohonan pendakwa raya melalui notis bertarikh 26 April 2018, antara lain, untuk perintah perlucutan aset tertentu milik setiap responden di Mahkamah Tinggi. Perayu adalah responden kedua di Mahkamah Tinggi. Alasan rayuan yang diandalkan oleh perayu adalah: (a) hakim Mahkamah Tinggi yang bijaksana telah terkhilaf apabila memutuskan bahawa pihak pendakwaan telah memenuhi beban pembuktian bahawa semua harta yang dimohon untuk dilucutkan adalah hasil dari kesalahan predikat di bawah s 420 Kanun Keseksaan ('Kanun') ('isu pertama'); dan (b) hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam menerima masuk pernyataan responden ketiga, keempat dan kelima di Mahkamah Tinggi yang dibuat di bawah s 32 Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('AMLATFUAA') sebagai keterangan tunggal tanpa mengambil kira keterangan lain dalam memutuskan bahawa kesalahan predikat di bawah s 420 Kanun telah dilakukan ('isu kedua'). Berkaitan dengan isu kedua, perayu berhujah bahawa: (i) kes pendakwaan didasarkan sepenuhnya pada pernyataan yang diberikan oleh responden ketiga, keempat dan kelima di Mahkamah Tinggi ('hujahan pertama'); (ii) hakim bicara yang bijaksana telah terkhilaf kerana tidak berhati-hati dalam menilai pernyataan tersebut, terutamanya apabila jelas bahawa tidak terdapat keterangan lain selain daripada pernyataan tersebut ('hujahan kedua'); dan (iii) pernyataan yang diambil di bawah s 32 AMLATFUAA hanya boleh dirujuk dengan selamat sekiranya ada keterangan bebas lain yang cenderung menyokong pernyataan tersebut ('hujahan ketiga'). Perayu juga telah mengemukakan hujahan perlembagaan bahawa prosiding kes ini mempengaruhi hak perayu sebagaimana yang dilindungi di bawah perkara 13 Perlembagaan Persekutuan, iaitu hak ke atas harta ('hujahan perlembagaan').

Diputuskan, menolak rayuan:

(1) Dalam kes-kes di mana isu perlembagaan dibangkitkan, isu tersebut boleh diambil walaupun tidak dinyatakan secara khusus dalam petisyen kerana pendekatan ini akan memberi penghormatan kepada Perlembagaan Persekutuan dan konsep keluhuran Perlembagaan. Atas dasar inilah mahkamah telah membenarkan pihak-pihak untuk mengemukakan hujahan perlembagaan tersebut di hadapan mahkamah (lihat perenggan 17–18).

(2) Peguam perayu yang terpelajar tidak berhujah bahawa peruntukan undang-undang yang relevan di mana permohonan perlucutan dibuat

iaitu AMLATFUAA adalah tidak berperlembagaan. Sebaliknya, peguam telah membuat hujahan yang tidak lengkap. Mahkamah mendapati bahawa hujahan ini tidak dibuat dengan teliti atau difikirkan dengan baik. Hujahan ini tidak lain dan tidak bukan hanyalah hujahan 'dressed-up' dalam bentuk kerangka perlembagaan. Oleh itu, mahkamah menolak hujahan perlembagaan tersebut (lihat perenggan 19).

(3) Mahkamah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa syarat-syarat di bawah s 56(1) yang dibaca dengan s 61 AMLATFUAA telah dipenuhi. Dalam perenggan 72–85 dari alasan penghakiman bertulis hakim Mahkamah Tinggi yang bijaksana telah mempertimbangkan status harta tersebut dan menyimpulkan bahawa harta tersebut diperoleh dari hasil aktiviti haram. Mahkamah juga telah mempertimbangkan rekod rayuan dengan teliti dan mahkamah berpuas hati bahawa terdapat keterangan yang mencukupi dikemukakan di Mahkamah Tinggi yang menunjukkan bahawa harta tersebut sememangnya diperoleh bukan dengan cara yang sah, tetapi dari hasil aktiviti haram (lihat perenggan 28–29).

(4) Hujahan pertama dan hujahan kedua tidak bermerit kerana terdapat keterangan lain di hadapan Mahkamah Tinggi. Berkaitan dengan hujahan ketiga, tidak terdapat apa-apa dalam kes *Pendakwa Raya v Awalluddin bin Sham Bokhari* [2017] MLJU 1766 yang dapat ditafsirkan sebagai meletakkan prinsip bahawa koroborasi adalah keutamaan bagi pernyataan di bawah s 32 AMLATFUAA untuk diterima atau diandalkan. Dalam kes tersebut, Mahkamah Persekutuan dengan jelas telah menyatakan bahawa berdasarkan s 40, pernyataan yang dicatatkan di bawah s 32 akan diterima walaupun terdapat undang-undang bertulis yang bertentangan. Oleh itu, tiada merit dalam hujahan ketiga. Selain itu, mahkamah telah mempertimbangkan dengan saksama pernyataan tersebut sebagai pernyataan yang boleh diterima masuk dan diandalkan oleh hakim yang bijaksana dalam membuat penilaian dan memutuskan permohonan di bawah s 56 AMLATFUAA. Tidak terdapat kesalahan dalam cara hakim yang bijaksana menilai keterangan di hadapannya (lihat perenggan 32–36).]

Cases referred to

A Dickinson v PP [1955] 1 MLJ 191 (refd)
Adler v George [1964] 1 All ER 628; [1964] 2 QB 7, QBD (refd)
Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad [2010] 2 MLJ 41; [2010] 1 CLJ 444, CA (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Howard and Others v Bodington (1877) 2 PD 203 (refd)
Lim Mey Lee Susan v Singapore Medical Council [2012] 1 SLR 701, CA (refd)
Liverpool Borough Bank v Turner (1860) 30 LJ Ch 379 (refd)

Noor Ismahanum Mohd Ismail v PP [2019] 2 MLJ 536; [2018] 10 CLJ 597, CA (folld)
Pendakwa Raya v Awalluddin bin Sham Bokhari [2017] MLJU 1766; [2018] 1 CLJ 305, FC (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
PP v Jitweer Singh a/l Ojagar Singh [2014] 6 MLJ 222, FC (refd)
PP v Kuala Dimensi Sdn Bhd & Ors [2018] 6 MLJ 37; [2019] 3 CLJ 650, CA (folld)
Regina v Soneji and another [2006] 1 AC 340, HL (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds from Unlawful Activities Act 2001 ss 4(1), 32, 40, 56, 56(1), (2), (3), (4), 61
Courts of Judicature Act 1964 s 53(2)
Federal Constitution art 13
Penal Code s 420

Appeal from: Criminal Appeal No WA-44–76–04 of 2018 (High Court, Kuala Lumpur)

Mohd Haziq Dhiyauddin (Aiman Abdul Rahman with him) (Shahrul Hamidi & Haziq) for the appellant.
Mohd Dusuki Mokhtar (Faizah bt Mohd Salleh, Nahra bt Dollah and Suriantiazila Mohamad with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Nasfy JCA:

INTRODUCTION

[1] This is an appeal by the appellant, being respondent No 2 in the High Court, against the order made by the High Court on 24 April 2019 which allowed the public prosecutor's application vide a notice dated 26 April 2018, inter alia, for an order of forfeiture of specific assets belonging to each of the respondents.

[2] The first, third, fourth and seventh respondents in the High Court did not file any objection to the notice. Only respondent No 2, the appellant before us, respondent No 5 and 6 have contested the notice.

[3] In the notice by the public prosecutor, it sought to forfeit the following properties of the appellant:

(a) cash amounting to RM53,000 seized on 27 April 2017;

(b) cash amounting to RM850,000 seized on 27 April 2017;

(c) cash amounting to Rupiah 18m seized on 27 April 2017; and

(d) cash amounting to RM100,000 seized on 27 April 2017.

[4] Having heard the arguments of the parties, the learned High Court judge had allowed the public prosecutor's application and made the order of forfeiture of all the properties.

[5] Dissatisfied, the appellant appealed to us. We heard the appeal and had unanimously dismissed the same. We now give our reasons.

THE PETITION OF APPEAL AND THE CONSTITUTIONAL POINT

[6] In his petition of appeal, the appellant had alluded to two grounds upon which he contends that the appeal must be allowed. Those two grounds are stated in para 4 of the petition. For convenience, they are as follows (in the original language as they are couched):

(i) Yang Arif Hakim Bicara Yang Bijaksana telah terkhilaf apabila Yang Arif Hakim Bicara Yang Bijaksana telah memutuskan bahawa Responden telah melepasi beban pembuktian dalam membuktikan kesemua harta yang dimohon untuk dilucutkan dalam Notis Usul bertarikh 26.4.2018 adalah hasil daripada kesalahan predikat di bawah seksyen 420 Kanun Kesiksaan; dan

(ii) Yang Arif Hakim Bicara Yang Bijaksana telah terkhilaf apabila Yang Arif Hakim Bicara Yang Bijaksana telah menerima rakaman percakapan di bawah seksyen 32 AMLATFPUAA 2001 Responden ke-3, Responden ke-4 dan Responden ke-5 sebagai keterangan tunggal tanpa mengambil kira keterangan lain dalam memutuskan bahawa kesalahan predikat di bawah seksyen 420 Kanun Keseksaan telah dilakukan.

[7] In the written submission and during the course of the oral submissions however, learned counsel for the appellant had also sought to impress upon us the existence of a constitutional dimension upon which the appeal should be allowed. We note of course that this argument was also raised before the High Court. It did not impress the learned High Court judge.

[8] As the practice of counsels submitting on matters outside the purview of the petition of appeal, is occurring all too often, we would like to say a few words on it.

[9] In respect of a petition of appeal, s 53(2) of the Courts of Judicature Act 1964 provides as follows:

> Every petition of appeal shall be signed by the appellant or his advocate and shall contain particulars of the matters of law or of fact in regard to which the High Court is alleged to have erred, and, except by leave of the Court of Appeal, the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those set forth in the petition.

[10] Thus, to constitute a proper petition of appeal the petition must:

(i) be signed — either by the appellant himself or his advocate;

(ii) shall contain particulars of:

(a) law; or

(b) fact; or

(c) mixed fact and law

that the High Court had erred.

[11] We have included (c) above as we are of the considered view that the word 'or' appearing between the words 'of law' and 'of fact' should be read as 'and/or'. That will then produce the harmonious result (see *Adler v George* [1964] 1 All ER 628; [1964] 2 QB 7), as often times, there will be a great mixture of facts and law in the decision appealed from and that there is no need to clearly demarcate between pure question of law on the one hand and pure question of fact on the other hand.

[12] It is to be noted too that apart from defining the constituent elements of a valid petition of appeal, s 53(2) of the Court of Judicature Act 1964 also provides a consequential impact of not properly condescending to particulars of the alleged error(s) made by the High Court: that the appellant 'shall' not be permitted to rely on any other grounds not stated in the petition.

[13] Now generally, the auxiliary word 'shall' will be interpreted to produce an imperative requirement. In the case of *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41; [2010] 1 CLJ 444, this court speaking through Abdul Malik Ishak JCA had the following to say:

> We observe that the word 'shall' appears in s 8 of the National Language Acts 1963/1967 (Act 32). Likewise, the word 'shall' also appear in r 18(1) and r 101 of the Rules of the Court of Appeal 1994. It is quite obvious that the use of the word 'shall' raises a presumption that the particular provision is imperative (*State of UP v Manbodhan Lal Srivastava, and Manbodhan Lal Srivastava v State of UP,* AIR [1957] SC 912, at p 917; *State of Uttar Pradesh and Others v Babu Ram Upadhya,* AIR [1961] SC 751, at p 765; *M/s. Sainik Motors, Jodhpur and Others v State of Rajasthan,* AIR [1961] SC 1480, at p 1485; and *Govind Lal Chaggan Lal Patel v The Agriculture Produce Market Committee and others,* AIR [1976] SC 263, at p 267), and it is also ordinarily mandatory. It is also correct to say that when a statute uses

A the word 'shall', prima facie it is mandatory. And once it is held to be mandatory, the failure to comply with it will invalidate anything done under the statute.

[14] However it must be emphasised that the task of the court will not stop at making prima facie conclusion but in the words of Lord Campbell in the case B of the *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379:

> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get C at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

That statement was echoed by Lord Penzance in *Howard and Others v Bodington* (1877) 2 PD 203 in the following way: D

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect E decide whether the matter is what is called imperative or only directory.

The approach to this aspect of statutory interpretation was reviewed by Lord Steyn in *Regina v Soneji and another* [2006] 1 AC 340 where it was stated as follows: F

> A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply G with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely: (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act; and (2) requirements where a failure to comply would not H invalidate an act provided that there was substantial compliance.
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> Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No 3 of 1999)*, the emphasis ought to be on the I consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity.

We should also like to add that the Court of Appeal, Singapore in *Lim Mey Lee Susan v Singapore Medical Council* [2012] 1 SLR 701 made the following

observation:

> [w]e would observe (as the Judge also noted) that the dichotomy between the mandatory effect and the directory effect of words (used in statutory provisions) which are ex facie mandatory (eg, the word 'shall') has been abandoned by the English courts in favour of the practical approach of determining Parliament 's intention in each case so as to ascertain whether or not a failure to comply with a 'shall' requirement would result in a nullity (see *Regina v Soneji* [2006] 1 AC 340). Our courts should follow suit.

[15] However in respect of the auxiliary word 'shall' appearing in s 53(2) of the Courts of Judicature Act 1964, there is no direct pronouncement on it. The Federal Court in the case of *Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222, speaking through Jeffry Tan FCJ did not directly answer this point but stated it in this fashion:

> All petitions of appeal must particularise the points of law or of fact which the court appealed from is alleged to have erred. But that is not to say that the court is therefore powerless to permit a point of law or of fact, which is not on the petition of appeal, to be raised.

[16] The Federal Court went on to refer to a situation where an appellant who is not represented was given a greater latitude to raise points outside the petition of appeal. The Federal Court seems to suggest that the appellate court reserves the discretion in an appropriate case to allow points of law or of facts to be argued despite the same not being specifically stated in the petition on the basis of a necessity to avoid excessive didacticism, a practice deprecated by Thompson CJ in *A Dickinson v Public Prosecutor* [1955] 1 MLJ 191. Whilst we loyally accept that pronouncement and approach by the Federal Court we must also add that in appropriate cases an appellant, especially when he is properly represented by counsel must be put to strict confines of his petition of appeal as we have observed, of late, an alarming tendency of counsels to veer off the parameters of the petition to the extent of wasting the already scarce judicial time.

[17] We should like to also add that however in cases where a constitutional issue is raised, the point may be taken although not specifically stated in the petition as this approach will give due respect to the Constitution and the very concept of the supremacy of the Constitution.

[18] Having said that and to return to the case at hand, it is on this basis that we had allowed the parties to canvass before us this so-called constitutional argument. Learned counsel for the appellant argued that the proceeding herein impinges upon the appellant's right as protected under art 13 of the Federal Constitution, namely the right to property. He cited the case of *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, a decision of the Federal Court

especially on the interpretation of the words 'save in accordance with law' where the following passage appears:

> The Federal Court in the case of *Che Ani Itam v Public Prosecutor* [1984] 1 MLJ 113; [1984] 1 CLJ 72; [1984] 1 CLJ Rep 84 adopted the meaning of the word 'law' in the phrase 'save in accordance with law' in art 5(1) given by the Privy Council in the Singapore case of *Ong Ah Chuan v Public Prosecutor*, *Koh Chai Cheng v Public Prosecutor* where it was held that the term 'law' in the phrase refers to: ... a system of law which incorporates those fundamental rules of natural justice that had formed part of the common law of England and was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that 'law' which citizens could have for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules' (*Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785 ; [2013] 8 CLJ 471 per Azahar Mohamed JCA, as he then was, delivering the judgment of the court).

[19] We are however left bewildered by the reference to the passage quoted above and baffled at the actual sting of the argument. It bears emphasis that learned counsel however had not sought to argue that the relevant provisions of the law under which the application for forfeiture was made namely the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds from Unlawful Activities Act 2001 ('the AMLATFUAA') are unconstitutional. Instead a rather inchoate submission was canvassed as stated earlier. It seems to us that this submission is not carefully made or well thought out. It is not out of place to say on hindsight that this is nothing but a dressed-up argument in the garb of constitutional point. We have no difficulty in rejecting this submission. We therefore leave the question as to whether the relevant provisions of the AMLATFUA are intrinsically congruent with the provisions of the Constitution.

THE SUBMISSION — THE BURDEN OF PROOF AND THE ASSESSMENT OF EVIDENCE

[20] The Appellant contends that the learned High Court judge had erred in coming to the decision. According to learned counsel, the High Court is required under s 56(1) of the AMLATFUAA to make the following findings before making the forfeiture order:

(a) that the properties seized by the respondent were proceed of the unlawful activity under s 4(1) of the AMLATFUAA;

(b) that the appellant had engaged directly or indirectly, in the transactions that involved the proceeds of unlawful activity; and

(c) the unlawful activity in the instant case which refers to the predicate offence under s 420 of the Penal Code, the respondent must prove that

the said offence has been committed in that the appellant had cheated. A

[21] Section 56 of the AMLATFUAA deals with a process easily described as civil forfeiture by which the public prosecutor seeks to forfeit the moveable or immovable property belonging to a person. In short, it applies: B

(a) where there is a seizure of property under the Act; and

(b) where there is no prosecution or conviction under s 4(1) of the Act or a terrorism financing offence.

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[22] As regards to the basis on which the forfeiture can be based, s 56(1) read together with sub-s (2) provides the answer, namely on the following grounds that the property is:

(a) the subject-matter or evidence relating to the commission of an offence under sub-s 4(1) or a terrorism financing offence; D

(b) the terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence. E

[23] Section 56(1) further provides that the application must be made within the time frame stipulated, namely before the expiration of 12 months from either:

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(a) date of seizure; or

(b) date of the freezing, where there is a freezing order.

[24] To buttress the point on the significance of making the application within the time stipulated, s 56(3) provides that where no such application is made (within the time stipulated) the property must be released to the person from whom it was seized. G

[25] In respect of the standard of proof in making a determination on the status of the property and in making the order of forfeiture, s 56(4) provides that the standard applicable is the balance of probabilities, or the civil standard of proof only and not beyond reasonable doubt. This is only natural as this exercise pertains to, as stated above, a civil forfeiture. H

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[26] Thus in short, s 56(1) deals with the following imperatives:

(a) the pre-condition to making the application;

(b) the time within which the application for the forfeiture must be made;

(c) the determination of the legal status of the property; and

(d) the standard of proof.

[27] We are therefore in agreement with the following view expressed by another division of this court in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37; [2019] 3 CLJ 650:

> [39] As can be seen, before the amendment under AMLATFA, the PP may seize the property under sub-s 56(1) solely on the ground that if he is satisfied that such property had been obtained as a result of or in connection with an offence under sub-s 4(1) or a terrorism financing offence, or is a terrorist property. The amended s 56(1) under AMLATEPUA retained these conditions in the new s 56(1)(a) and (b) and added two more conditions for seizure that is, if such property is (c) the proceeds of an unlawful activity or (d) the instrumentalities of an offence. It is to be noted that s 56(1)(a) of AMLATEPUA uses different terminology. Instead of 'had been obtained as a result of or in connection with' (as in AMLATFA), the new terminology used is 'the subject-matter or evidence relating to the commission of' such offence.
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> [40] Similarly, previously before the amendment, under AMLATFA, a judge to whom an application is made under sub-s (2), shall only make an order for forfeiture of the property if he is satisfied that the property is the subject-matter of or was used in the commission of an offence under sub-s 4(1) or a terrorism financing offence or is a terrorist property. The amended s 56(2) under AMLATEPUA retained these conditions in the new s 56(2)(a)(i) and (ii) and added two more conditions for forfeiture, that is, if the property is (iii) the proceeds of an unlawful activity or (iv) the instrumentalities of an offence.
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> [41] It would seem that the two new conditions added by the amendment (under AMLATEPUA) in allowing the property to be seized or forfeited respectively on the basis that the property is the proceeds of an unlawful activity or the instrumentalities of an offence, has made the burden thrust upon the PP and the judge lighter or easier in that they are given a further choice under which category the property can be seized or forfeited. Previously under AMLATFA, the PP may only seize property solely on the grounds that if such property had been obtained as a result of or in connection with an offence under sub-s 4(1) and the judge likewise, shall only order for forfeiture solely on the ground that if the property is the subject-matter or was used in the commission of an offence under sub-s 4(1). But with the amendment under AMLATEPUA there are four categories available and the last two categories, especially category (c), that the property is the proceeds of an unlawful activity has departed the emphasis of seizure and forfeiture from the attachment of guilt or otherwise on any person under s 4(1) to the emphasis on the legal status of the property itself (see this court's case of *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2018] MLJU 205).

[28] Following from the above we are in agreement with the learned High Court judge that the requirements under s 56(1) read with s 61 of the AMLATFUAA have been met. In paras 72–85 of the written grounds the

learned High Court judge had considered the status of the property and came to the conclusion that the properties were acquired from the proceed of unlawful activity.

[29] We have also carefully considered the record of appeal and satisfied ourselves that the evidence presented before the High Court showed an overwhelming evidence that the properties were indeed acquired not from lawful means, but from the proceeds of unlawful activity. We note especially the following:

(a) that the evidence showed that the appellant was the mind and brain behind an activity that was sought to be passed off as a lawful activity that deals with crude palm oil and hence the enterprise underlying this activity was named CPO Resources: that acronym, in all probability refers to crude palm oil;

(b) no evidence was tendered to show the fact that crude palm oil was traded in an open market or closed market in the sense that no purchase or sale orders were produced;

(c) the evidence showed that the CPO Resources's account was used only to receive and pay out monies. The respondents in the court below who challenged the forfeiture application were at pains to justify the money coming in and out from the account. This leads to the irresistible conclusion that the entire transactions, either by way of cash or cheque debits and credits were nothing more that a money game. This is corroborated to a large extent from the evidence of the respondents in the court below of the existence of 'investors' and 'agents' which cannot be satisfactorily explained by either of the respondents including the appellant here;

(d) the attempt by the appellant to establish that the properties were acquired from lawful proceeds by showing financial statements appeared to have blown in his face especially where the financial statements were limited to the year 2000 whereas the properties were acquired later than the year 2000. It is improbable that all this while the monies were kept 'under his pillow' as it were and the properties were acquired from the proceeds that were brought forward to 2016. Even if there is some iota of credence to that story, which we express serious doubts, the appellant was adjudged a bankrupt in 2008 and thus by operation of law, his affairs, including his cash will have to be managed by the Director General of Insolvency. Thus, there is no plausibility that the properties could have been acquired in accordance with lawful business enterprise. In coming to this view, we have carefully scrutinised the financial records and cannot come the conclusion that was sought to be urged upon the High Court and us that the business is so profitable so as to allow the acquisition of the properties, which were sought to be forfeited; and

A (e) it is not in dispute too that the appellant was charged under s 420 of the Penal Code being the predicate offence.

[30] It must be mentioned too that apart from the evidence stated above, there were statements taken by the investigating officer. These statements were
B taken from the other respondents. They were taken under the enabling provision of s 32 of the AMLATFUAA. They were taken from, among others the respondent Nos 3, 4 and 5 named in the court below. The appellant in the written submission identified these respondents as follows:

C (a) respondent 3 — son of the appellant;

(b) respondent 4 — the proprietor of a business connected to the appellant; and

(c) respondent 5 — ex-wife of the appellant.

D

[31] There is no doubt that in short, these statements, according to the submission of learned counsel for the appellant, laid the blame entirely on pointed fingers the appellant. But what is sought to be emphasised is that these statements have been improperly relied on by the learned High Court judge.
E We will now direct our mind to this aspect.

THE ADMISSIBILITY OF S 32 STATEMENTS

[32] On this issue learned counsel submitted that first, the prosecutor's case
F is premised entirely on the statements given by respondents No 3, 4 and 5. We have shown in the earlier paragraphs on the evidence presented by the prosecutor. Thus, there is no merit in this contention.

[33] Second, it was contended that the learned judge had erred in failing to
G exercise caution in evaluating the statements, especially so when there was a clear absence of other evidence apart for the statements alone. This submission too is without merit on the same reason as we have stated earlier in that that there were evidence before the High Court.

H **[34]** Third, it was argued that the statements taken under s 32 could only be safely relied upon if there were other independent evidence which tend to corroborate the statements. In support of this contention learned counsel for the Appellant had cited the case of *Pendakwa Raya v Awalluddin bin Sham Bokhari* [2017] MLJU 1766; [2018] 1 CLJ 305 and sought to impress upon
I us that there the court had admitted the s 32 statements only when there were 'numerous records and documents which were exhibited in the affidavit'. We must say at once that we disagree with this proposition. In our considered judgment, a proper reading of the case does not yield the proposition as being advanced by learned counsel. It is clear therefore that there is nothing in the

case which could be construed as laying down a principle that corroboration is *a priority* for the statements under s 32 to be admitted or relied upon. That interpretation will tantamount to placing a requirement not contemplated by the AMLATFUAA. It must be reiterated that in *Pendakwa Raya v Awalluddin bin Sham Bokhari* [2017] MLJU 1766; [2018] 1 CLJ 305 the Federal Court in no uncertain term, had stated that by virtue of s 40, the statements recorded under s 32 will be admissible notwithstanding any written law to the contrary. The following passages are relevant:

> [22] Section 32 of the Act confers wide powers on the investigation officer in investigating an offence of money laundering or terrorism financing offence. He may order any person whom he believes to be acquainted with the facts and circumstances of the case to:
>
> (a) attend before him for examination;
>
> (b) produce before him any property, record, report or document; or
>
> (c) furnish to him a statement in writing made on oath or affirmation.
>
> Any person who disobeys the order of the investigation officer commits an offence.
>
> [23] The investigation officer is empowered to administer an oath or affirmation to the person being examined. The person being examined shall be legally bound to answer all the questions and to state the truth save that he may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.
>
> [24] The admissibility of the record of examination of any person or any property, record, report or document obtained by the investigation officer is governed by s 40 of the Act. The section overrides any written law or rule of law to the contrary. It states:
>
> > 40. The record of an examination under paragraph 32(2)(a), any property, record, report or document produced under paragraph 32(2)(b) or any statement under paragraph 32(2)(c) shall, notwithstanding any written law or rule of law to the contrary, be admissible as evidence in any proceedings in any court for, or in relation to, an offence or any other matter under this Act or any offence under any other written law, regardless whether such proceedings are against the person who was examined, or who produced the property, record, report or document, or who made the written statement on oath or affirmation, or against any other person.

[35] Thus, in our judgment there is no merit in the contention of the appellant on this point. We have carefully considered the statements, including exhs 'JE10', 'JE14' and 'JE27' to be statements that could be properly admitted and relied upon by the learned judge in making the assessment and disposing the application by the public prosecutor under s 56 of the AMLATFUAA.

[36] In short, we find no fault in the manner in which the learned judge had

A evaluated the evidence before him. We too have given the matter careful consideration and had arrived at the same conclusion.

[37] Learned counsel had complained that the appellant had been prejudiced by the reliance on the s 32 statements and thus by relying on the case B of *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 the court must retain the discretion to reject evidence that had been unfairly obtained against an accused person. We find this submission to be misconceived. First, *Gooi Ching Ang* was decided based entirely on a different set of factual matrix. Second, the decision relates to the admissibility of different kind of evidence. Third and C more importantly, s 40 of the AMLATFUAA does not admit the possibility that the court retain some kind of discretion to reject the admissibility of s 32 statements.

[38] There is yet another matter that we must mention. It is this. There is no D suggestion by the appellant that the statements were obtained not in accordance with law, or that they were improperly or illegally obtained. The appellant too was never denied the opportunity to controvert the statements under s 32. Indeed, following *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2019] 2 MLJ 536; [2018] 10 CLJ 597 the burden shifts to the E appellant to show that the properties were obtained lawfully and that the forfeiture application has no basis in law. In the present case the appellant has failed to discharge this evidential burden. In fact, a proper evaluation would establish the position asserted by the public prosecutor.

F CONCLUSION

[39] For the reasons adumbrated above the appeal must fail. Accordingly, the appeal stands dismissed.

G *Appeal dismissed.*

Reported by Dzulqarnain bin Ab Fatar

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